UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

V.

DAVID ICCHOK SHACKNEY, aka.,
DAVID ISSAC SHACKNEY and
DAVID I. SHACKNEY,
Defendant

INDICTMENT NO. 10,698
(18 U.S.C. 1584)

The Grand Jury charges:

COUNT III

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Icchok Shackney did willfully and knowingly hold one Luis Humberto Ubiarco Oros to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

COUNT V

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Icchok Shackney did willfully and knowingly hold one Maria Elena Oros to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

COUNT VI

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Icchok Shackney did willfully and knowingly hold one Maria Teresa Oros to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

COUNT VII

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Icchok Shackney did willfully and knowingly hold one Sergio Oros to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

50-14-2

COUNT VIII

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Icchok Shackney did willfully and knowingly hold one Maria Virginia Oros to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

COUNT IX

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Icchok Shackney did willfully and knowingly hold one Luiz Maria Oros to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

A TRUE BILL

Foreman

ROBERT C. ZAMPANO
United States Attorney

JAMES D. O'CONNOR
Assistant United States Attorney

VRS

Ca APR 17 1963

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v. : NO. 10,698 CRIMINAL

: (18 U.S.C. 1581(a))
(18 U.S.C. 1584)

DAVID ICCHOK SHACKNEY, aka.,
DAVID ISSAC SHACKNEY and
DAVID I. SHACKNEY : FILED JULY 17, 1962
HARTFORD

INDICTMENT

The Grand Jury charges:

COUNT I

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Icchok Shackney did hold one Luis Humberto Ubiarco Ores to a condition of peonage.

In violation of Section 1581(a), Title 18, United States Code.

COUNT II

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Icchok Shackney did hold one Virginia Espina Ores to a condition of peonage.

In violation of Section 1581(a), Title 18, United States Code.

COUNT III

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Icchok Shackney did willfully and knowingly hold one Luis Humberto Ubiarco Ores to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

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COUNT IV

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DEPT.

[illegible] 1961, and continuing

Connecticut, in the District of Connecticut, David Ischok Shachmay did willfully and knowingly hold one Virginia Regina Cruz to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

COUNT V

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Ischok Shachmay did willfully and knowingly hold one Maria Elena Cruz to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

COUNT VI

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Ischok Shachmay did willfully and knowingly hold one Maria Teresa Cruz to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

COUNT VII

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Ischok Shachmay did willfully and knowingly hold one Sergio Cruz to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

COUNT VIII

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Ischok Shachmay did willfully and knowingly hold one Maria Virginia Cruz to

In violation of Section 1584, Title 18, United States Code.

COUNT IX

That, beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, in the City of Middlefield, Connecticut, in the District of Connecticut, David Inchok Shechmey did willfully and knowingly hold one Luz Maria Cros to involuntary servitude.

In violation of Section 1584, Title 18, United States Code.

A TRUE BILL.

[redacted]
Foreman

ROBERT C. ZAMPANO
United States Attorney

James D. O'Connor
JAMES D. O'CONNOR
Assistant United States Attorney

APR 17 1963

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	)	
	)	
VS.	)	NO. 10,698 CRIMINAL
	)	
DAVID ICCHOK SHACKNEY, a/k/a	)	
DAVID ISSAC SHACKNEY and	)	
DAVID I. SHACKNEY	)	

DEFENDANT'S BRIEF ON MOTION FOR NEW TRIAL

I. The Verdict Is Against The Heavy Weight Of The Evidence.

> " To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require."
>
> Aetna Casualty & Surety Co. vs. Yeats, 122 F. 2d 350 (4 Cir. 1941), per the late Chief Judge Parker.

The role of the trial court in passing upon a motion for a new trial is far different from his duty to decide whether there was "sufficient" evidence, if believed, to send the case to the jury. "On such an application, the Court may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted." United States vs. Robinson, 71 F. Supp. 9, 10-11 (D.D. C. 1947); See also United States vs. Kelly, 119 F. Supp. 217 (D.D.C. 1954); United States vs. Knadt, 31 F. Supp. 546 (N. D. Ind. 1940); United States vs. Parelius, 83 F. Supp. 617 (D. Haw. 1949);

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United States vs. Beaco Musical Instrument Co., 135 F. Supp. 220 (D. Mass. 1955).

Judge Holtzoff characterized the responsibility placed on federal trial judges in this regard in United States vs. Wilson, 178 F. Supp. 881, 883 (D.D.C. 1959), when he said,

> " I personally have a mounting sense of admiration for the type of justice that is generally meted out by the average jury. Nevertheless, all human beings are fallible. If a verdict is contrary to the weight of the evidence, it is the duty of the judge to set it aside. It is a duty that cannot be avoided, although the responsibility involved is great."
>
> ++++
>
> " It must be borne in mind that there is no way of reviewing a verdict of a jury on the facts except by a motion for a new trial made before the trial judge. The Court of Appeals may not review the facts, that is, it may not reverse a conviction because it is contrary to the weight of the evidence. Its authority is limited to reviewing questions of law, in this instance whether there was sufficient evidence to submit the issue to the jury."

Occasionally, although the system generally works quite well, a jury somewhere goes off on a tangent and makes a big mistake. It is in these situations where the judge's seemingly role as the "thirteenth juror" becomes tremendously important. As Judge Holtzoff pointed out, this is the accused's "last shot" at a review of the facts and evidence; it is submitted that the responsibility to prevent a miscarriage of justice at this stage of the proceedings is even greater in this circuit due to the comparatively meager requirements of the "Second Circuit Rule" concerning sufficiency of evidence to present a jury issue.

We start with the almost incredible proposition that the story of Luis Oros presents--if true. This was discussed at

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length in the brief on the motion for judgment of acquittal. The theory that a man would set about to "hold" someone in such a manner is absurd almost to the point of disproving itself. Why would Shackney leave the truck with the keys in it if he knew Oros wanted to leave? Why make threats by such innuendo that it is logically almost impossible to carry them over to the issue of staying or leaving.

Aside from the fact that it is incredible that such a course of conduct on the part of the accused "held" Luis Oros "involuntarily" on the farm, the credibility of Oros is subject to grave doubt.

First, we have the letters which describe a far different picture than the one painted at trial. But Oros tells us the letters were written that way only because their mail was tampered with. This story itself is highly improbable. (1) The evidence shows that the mailman usually came at a time when the Shackneys were away. (2) Although the envelopes, allegedly befouled with paste and glue, were turned over the Government, they were not produced in court to substantiate the story. (3) Many of the letters in evidence -- and mailed through the defendant -- do contain certain references critical of the defendant. (4) Defendant's Exhibit 12, written the day after the family arrived in Connecticut, states that Shackney had provided everything he had promised--this in direct contradiction of Oros' trial testimony.

Concerning the doubt cast on Oros' credibility by the letters, it is significant that the only instances of good times the family would admit to were the ones the letters tried them down. The attempted explanations of these incidents were

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for the most part too absurd to deal with here at length. The Christmas presents, it is submitted, cast grave doubt on the story told by the complaining witnesses. We concede that the presents are not necessarily inconsistent with a holding to involuntary servitude. They are, however, completely inconsistent with the picture of the accused painted by Oros & Co. --that of an evil man who had cheated, abused and harshly mistreated this family. Why would such a person go out of his way to spend an obviously substantial sum of money for gifts for them? Only the specificity of Defendant's Exhibit 40 permitted the court to be apprised of the Christmas Gifts at all.

In determining how credible the claim of Luis Oros is that he was terrified by the Shackney threat to send him back to Mexico, we must look at this man. Is he the backwoods, untouched and naive Mexican? Not a bit. He is a man who lived in one of the tourist capitals of this hemisphere for many, many years. A baseball player; possessor of a lottery salesman's license; finally, a taxi cab driver for eleven years in a place where American visitors abound. He had been to this country twice before for a total of eighteen months--and had been trying to re-enter for fifteen years. This is the man who knew <u>everything</u> about how to get in by his own admissions, but <u>nothing</u> about his rights after he arrived. This is the man who was terrified and cowed because he believed that "everyone" was the "friend" of the accused--these things are absolutely incredible.

The Oroses claimed that the entire family of seven had to work long hours to finish the work on the defendant's farm.

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It is significant, however, that while all of the complaining witnesses could recall in detail occurrences in Mexico City--and threats allegedly made by the accused, all of them were absolutel, vague as to how much work they did and how long it took to perform various chores. In this regard, examine the evidence given by the witnesses Tobin and Parmelee. Neither had any axe to grind on behalf of anyone. Yet Tobin, as an expert in the chicken business, gave convincing and uncontroverted testimony that the work on the Shackney farm could have been cost in four hours by three adults working in a leisurely manner; such testimony was based on the volume of eggs handled along with his personal knowledge of the conditions of mechanization on the farm. Parmelee's testimony is even stronger; he, alone, handles 25% more eggs than the whole Oros family allegedly spent all day and half the night on-- 20 cases to 16, or 7200 eggs daily to 6000. Parmelee's testimony makes it quite clear why the three Oros children were so vague as to how long it took to clean waterers, etc.

The foregoing testimony is of extreme importance. It completely puts the lie to the claim by Oros that the whole family worked fantastically long hours. Consequently, it throws a long shadow over the testimony of all family members who appeared. Specifically, the testimony of the two egg men, in conjunction with Maria Theresa's admission that her father sometimes watched T V while Sergio worked, sheds much light on the question of why the children did not attend school and of who kept them from school. In a somewhat similar situation, a district court in United States vs. Markowitz, 176 F. Supp. 681 (E. D. Pa. 1959) granted a new trial after a jury finding of guilty. There,

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"entirely credible" evidence by a defense expert, supporting defense contentions, was uncontroverted by the Government, thereby leading the judge to conclude than an unjust result had been reached. Here, there is no real basis for rejecting the testimony of Tobin and Parmelee--and that testimony clearly swings the pendulum of truth over to the side of the defense.

There is little to be gained by going over all the evidence in detail here. The defendant took the stand and was, we feel, a convincing and credible witness. The court was present, of course, and no doubt reached its own conclusions on that point. The government's case is so "way out" to begin with--so little supported by the physical facts as to access on and off the farm--that it strains our logical senses. That such a thing could have been and was perpetrated upon this particular complaining witness by this particular defendant in the particular manner alleged is ridiculous.

The jury verdict, if allowed to stand, will result in a serious miscarriage of justice. This is the accused's last opportunity to have the facts reviewed. We ask the court to set aside the jury verdict and grant a new trial.

II The Accused Was Denied A Fair Trial By The Improper And Prejudicial Conduct of The Prosecutor.

Every lawyer has not only the advocate's duty to his client, but also the duty of demonstrating only truth and fairness to the court and his opponent. The latter set of obligations is even more strictly visited upon the public prosecutor, the attorney for the sovereign--The United States of America. Berger vs. United States, 295 U. S. 78 (1935). It is submitted that, unfortunately, the prosecuting attorney in this case did not live up to the obligation of fairness to the accused.

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Perhaps the most serious breach of propriety involved some letters written by members of the Oros family from the farm in Middlefield to various friends and relatives here and abroad. The court will recall that various letters written by Luis Oros were offered as exhibits during the cross-examination of that witness; they were offered as prior inconsistent statements of the witness only on the issue of his credibility at trial. At that time, four letters were carefully identified as the last four letters written by Oros from Middlefield, Defendant's Exhibits for Identification, 28-31.

On redirect examination of Luis Oros, the government offered those letters as full exhibits. The offers were repeated and were accompanied by such vague, non-legal reasons for admissibility such as "We want the jury to get the whole picture", etc. (Defendant does not yet have a full transcript of the proceedings and is presently working primarily from trial notes).

Over the repeated sustaining of objections, the letters were offered time and again. For no apparent reason, Defendant's Exhibit 30, the letter from Oros to Davalos dated February, 1962 [illegible] was made a Government Exhibit for Identification, H H, in the presence of the jury.

Later on, particularly during the testimony of Messrs. Brewster and Milardo, the government again made a big fetish of the letters which had earlier been declared inadmissible. A great aura of mystery was deliberately thrown up to surround them. While Brewster was on the stand, two letters written by Maria Elena to her boyfriend were marked for identification, Q Q and S S. They were offered unsuccessfully as evidence of

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the girl's "state of mind". When the offer failed, the government then entered in evidence the two envelopes for the letters concerned, O O s-1 R R, although they could have little bearing on the case. Earlier, an envelope which had contained a letter "smuggled out" by Milardo had been offered, K K.

All of these persistent and unwarranted offers set the stage for the kill--which was attempted on summation. First on his opening argument, Mr. O'Connor asked the jury "why" the family had to "smuggle" letters out; he told them the envelopes were in evidence and they "could just imagine" what was in the letters--or the actual wording may have been that they should "guess" what was in them. Then, on rebuttal, the final flourish.

> " He raised the question of why. I think that since he asked you to ask yourselves that, why didn't he put all of the letters in? There were a great number of letters, letters written by Maria Elena. This was available to them. Did he introduce them? No, he didn't.
>
> " There was one particular letter introduced and commented on by Mr. Jacobs, a letter in which a portion had been excluded. Why did he exclude that? "

March 12, 1963, page 59.

The whole pattern of behavior shown here can only have been a deliberate and improper attempt to have the jury decide the case on the basis of things not in evidence. Although the court moved forcefully, after objection on rebuttal, the entire cloud thrown up by the prosecution was one which could not easily have been dispelled. In weighing the probable prejudice to the accused, we must consider the fact that, at best, the government's case was weak.

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A strikingly similar situation may be seen in a recent New York case, People vs. Rosenfeld, 11 N. Y. 2d 296, 183 N. E. 2d 656 (1962). There some Minifon spools of an important conversation had been kept out of evidence because they were not sufficiently audible. The prosecutor made continued offers of the spools and allusions to them. Finally, he referred to it in summation as a "third witness". The Court of Appeals reversed although the case against the defendants was extremely strong, surely a factor not here present. The court said,

> " grave and unfair damage was done to defendants by the suggestions to the jury that these suppressed 'spools' contained strong evidence against the defendants. Tamari's veracity was disputed and it was fatal to defendants to suggest to the jury that there was undisclosed corroboration of Tamari's testimony." 11 N. Y. 2d 290 at 296.
>
> " If this series of incidents did not make up a gross impropriety, we do not know what could be so labeled."
>
> 11 N. Y. 2d 290 at 297.
>
> " This record shows continued efforts by the prosecutor to put into the record matter inadmissible and prejudicial...The conclusion is irresistable that this prosecutor repeatedly called the jury's attention to material excluded from evidence and also to suggest to the jury, particularly in the case of the Minifon recordings, that substantial proof of guilt existed which had been kept from the jury's ears."

See also Pelron vs. United States, 239 F. 2d 311 (D. C. Cir. 1956).

In addition to the foregoing conduct relating to the letters, there were numerous other instances of improper, prejudicial conduct by the prosecutor. During the trial, upon the issue of Mr. Orts' credibility, the question was raised as to whether or not he was being " supported" in grand fashion over a period of six weeks during the trial of the case. He testified in a

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directly contradictory manner on two successive days concerning the payment of his expenses. In response to this, and without a shred of evidence to support it, Mr. O'Connor set about, twice, to testify on his rebuttal. First, at page 44, March 12, 1963, he said,

> " Mr. Oros is paid a witness fee just as every juror is paid a fee to come here each and every day. That's what he has been paid. That's all he could be paid. With that money, he pays his hotel room and with that money he pays his food and the other necessities of life."

Then, a moment later,

> " There was a change in that testimony, surely, because I brought that man into the Marshal's office to let him explain to him..."

Still another instance of testimony by Mr. O'Connor occurred at page 65, March 12, 1963 when he started to explain to the jury the somewhat mysterious gap of more than a month where nothing, apparently, was done either by way of talking to Mr. Oros or to Mr. Shackney.

It is the first rule of hornbook law that the advocates are to stick to the evidence and inferences therefrom in summation. Testimony at that point not only cannot be subjected to cross-examination, but it also has the advantage of coming from the United States Attorney, a respected public official. Luis Oros could have testified as to how much of a witness fee he was paid---it might have been interesting on cross-examination as to how he managed a $15.92 daily hotel bill and fed a family of eight on the statutory fee--while presumably keeping up an apartment in Philadelphia. Agent Simms could have testified as to the fees paid--but surely not the prosecutor on summation.

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The Second Circuit reversed a conviction based on much stronger evidence for much the same type thing in United States vs. Spangelet, 258 F. 2d 338 (2 Cir. 1958). There too the judge had instructed the jury, but the appellate court considered it too prejudicial to be cured. See also Ginsberg vs. United States, 257 F. 2d 950 (3 Cir. 1958); Stewart vs. United States, 247 F. 2d 42 (D. C. Cir. 1957).

The prosecutor here too attempted to throw his own belief in the defendant's guilt onto the scale--not once, but twice, after having been admonished by the court. The rule in most Federal courts appears to be that an affirmation of the defendant's guilt by the prosecutor in argument is not prejudicial where it appears that it is based only upon the evidence. Schmidt vs. United States, 237 F. 2d 342 (8 Cir. 1956); Contreras vs. United States, 218 F. 2d 14 (6 Cir. 1955); United States vs. Klein, 258 F. 2d 924 (2 Cir. 1958). The First Circuit has taken a much stricter view however. Greenberg vs. United States, 280 F. 2d 472 (1 Cir. 1960). Regardless of the usual rule, here it is clear, in view of the great mystery raised about the letters and the improper remarks made about them, that Mr. O'Connell was speaking from a better "vantage point" than the jury enjoyed; he "knew" more, or so they had been consistently led to believe. Under such circumstances, the affirmation of guilt was clearly improper and prejudicial.

The defense concedes that in many instances an admonition and instructions by the court have been deemed to have "cured" any impropriety. The defense further concedes that the court

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here, in the presence of objection and sometimes without it, acted vigorously. The admonition was not enough; it cannot always work to erase the prejudice. United States vs. Spangelet, supra; United States V. Conroe, 210 F. 2d 65 (3 Cir. 1954).

Rather than clutter this brief with numerous instances of improper conduct, we will call to the court's attention the obvious injection of irrelevant and highly prejudicial incidents such as the Sergio story of the "box" and the "burial", allowing Scarano to testify concerning his "impressions" of the Conroe house knowing they were improper and not evidentiary; the eliciting from Maria Elena of the story about how the defendant allegedly wrung the neck of a live chicken; finally the attack on the defendant's status as a rabbi on the basis of a lot of evidence that he "hadn't told" certain people he was a rabbi at one time or another. The pictures deliberately and improperly drawn for the jury were calculated to--and did--prejudice the jury. A verdict obtained by such conduct violates due process of law and should not be permitted to stand.

THE DEFENDANT

By_____
Jacobs, Jacobs, Jacobs & Jacobs
His Attorneys

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APR 17 1963

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	)	
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VS.	)	NO. 10,698 CRIMINAL
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DAVID ICCHOY SHACKNEY, a/k/a	)	
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DAVID I. SHACKNEY	)	

DEFENDANT'S BRIEF ON MOTION FOR JUDGMENT OF ACQUITTAL

Defendant has, at least in part, briefed this motion twice before. At this time we will attempt to avoid undue repetition; the period of time since the verdict, however, will perhaps allow us to approach the problem more methodically and logically.

I The Evidence Against The Defendant And The Government's Theory Of The Case.

Luis Oros testified, on Tuesday, February 5, 1963, that,

> " A. Well, I want to leave the farm because --is true; I am afraid, very afraid. In Mexico he told me, 'You have contract, if you break this contract, I deport you and you never more come back to the United States, not you, not your son, and not your grandsons, nobody, because I have lot of friends in Mexico and the United States, too, and I have lot of money, and money is money here or any place'..."

Further, that in February,

> " He say, 'You don't pay the notes,' in Mexico take my friend's house, Mr. Krajmalnik, or somebody take my friend's house, and this thing I know when I sign the notes, and this is where I am scared to leave the farm."

Counsel does not have in its possession the transcript of the other alleged threats testified to by Luis Oros. Notes taken at the trial, however, indicate the following: The accused is supposed to have told Oros that no one had better get sick on the farm and that sick people would be sent back to Mexico.

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This type of general threat appears to have been made more than once according to Oros--including the incident where such a statement specifically was addressed to Sergio. In addition, Oros state that on a few occasions Shackney told him about a Mexican that had earlier worked on the farm. Oros claims he was told that Shackney had summarily dispatched back to Mexico an employee who had lied to him-- and, on another occasion, he was told that a "bad" man who "drank" had been sent back without his wife and child, who were left crying on the farm. It is claimed that the accused somehow impressed upon Luis Oros that everyone of any consequence was a friend of his--Shackney's. Luis further testified that the defendant instructed the family never to talk with people who came upon the farm. Finally, it was claimed that the Croses were mistreated generally--that they were ill fed and poorly housed, kept from church and from school.

In addition to the threats already mentioned which are relevant to count three and, under the court's earlier rulings, to counts six through nine, there were some alleged threats testified to by Maria Elena relevant to count five. She stated that once she heard Shackney tell her father that if the notes were not paid, "the man" will take her uncle's house. She also claims she was told about sick people having to go back to Mexico. Finally, she testified that one time the defendant had told her that if anyone was seen off the farm, they would be sent back toMexico; she did not testify as to when this last threat was allegedly made, and did not testify that this "threat" was made while she was on the farm.

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From the foregoing facts, the government has attempted to construct its "case". They claim that the obtaining of American citizenship was of the utmost importance to Luis and that a threat to send him back and thereby deprive him of that was of the utmost gravity. They claim that we may infer from the stories and threats concerning the avoidance of sickness among the Oros family members--and concerning prior employees who had misbehaved in some way--that Shacknoy was threatening the Oroses with a similar fate should they attempt to leave the farm. They claim that the defendant implemented these threats (which he was concededly powerless to enforce) by keeping the family without cash funds and by contriving to see to it that they had little or no contact with the outside world.

II The Sufficienty of The Evidence.

We will not haggle with the applicability of the so-called "Second Circuit Rule" --and we concede, as we must, that the evidence must be taken in a light most favorable to the government, along with all reasonable inferences which may be drawn from that evidence. Nonetheless, there still must be sufficient evidence of the particular crime charged to allow a reasonable jury to reach a finding of guilt--and the government is entitled to only those inferences which flow reasonably from the evidence on the record.

Since we are dealing with the alleged inner reactions of a man's mind, the problems which arise from this particular case are extremely difficult to analyze and deal with. The court's analysis of the elements of the offense was clear and we will attempt to attack the evidence in those terms. Luis Oros tes-

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tified (1) that Shackney said certain things, (2) that these statements made Luis afraid to leave, and therefore (3) he stayed and worked "involuntarily"--against his volition. On its face, that testimony in a deceptively simple way seems to establish all we need to prove this offense; it makes everything a question of fact. But is that--or, indeed, can that be so?

We are willing to concede, for the purposes of this motion only, that Luis Oros was indeed afraid to leave--and that his fear, however reasonable or unreasonable, actually stemmed from the defendant's alleged remarks. A number of questions, however, remain. (1) Must not there be some reasonable connection between the alleged coercion and the alleged result it produced? (2) Even if the "coercion" was meant tomake Luis Oros choose to remain on the farm--and did accomplish that result--are the defendant's particular acts or threats prescribed by the statute here in question? (3) Is there sufficient evidence from which a reasonable jury could have inferred that the accused "held" these people to involuntary servitude knowingly and wilfully? We will attempt to deal with these problems separately.

A. Could A Jury Reasonably Find A Reasonable Connection Between The Alleged Criminal Acts And The Alleged Reaction of Luis Oros?

According to Oros' own testimony--and under the theory of the Government--the thing which held Luis in restraint was the threat to return him to Mexico and to prevent him from re-entering the United States. When was this alleged threat made? At some undetermined time, either 1960 or 1961, in Mexico before

Oros decided to come to Connecticut and work for Shackney.* This "prime" threat posed no danger to the physical health or well being of Oros or his family--nor did it offer the prospect of incarceration or other extreme restraint on the freedom of the Mexicans. Coupled with the offer to bring him and his family to this country was the promise (or threat) to return them if they broke the contract. Or, in the Court's earlier formulation, a built-in offer to end the servitude before the "victims" submitted themselves to it.

Further, the threat was remote. It was made at a time when Oros was free to come or stay--at a time outside the period of the indictment--and before there was any "holding". This threat cannot legally constitute the basis for a criminal holding to involuntary servitude. Just because a man says something in 1960 or 1961 in Mexico does not mean that, later on, in Connecticut he still meant to invoke the same penalty for the same conduct on the part of the Oroses. The earlier threat, as a criminal act, can have no legal effect unless it was renewed in some way at a time when there was some meaning in terms of somebody wanting to leave or being held. The only question really is--did Shackney do anything during the time the Oroses were on the farm to hold them there?

But the claim is that this threat was renewed, by innuendo, on some occasions after the Oroses came to Connecticut. Oros

* For simplicity's sake, we will not deal with the case on Count Five concerning the alleged holding of Marie Elena. She testified to much less than did her father and if his count is insufficient, hers must obviously fall also.

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was put in fear of attempting to leave, it is claimed, because Shackney threatened to send back to Mexico those who became ill. Oros feared to leave because Shackney had described the fate of some "bad" man who "drank" and who had lied to the defendant. Assuming Oros was afraid to leave because of these irrelevant threats, how can the accused be held accountable for such a fear? Unless a reasonable Mexican with Oros' background could have inferred from these threats a "renewal" of the earlier threat, they can have no effect to charge the accused with this particular felony. Did these particular statements by the defendant pose any threat to the Mexicans' freedom to leave the farm? Surely no reasonable individual, Mexican or otherwise, could so conclude. This type of claimed "innuendo" can have no probative weight. The only things which can be inferred from these threats are that Shackney put a premium on hard work and honesty and would punish malingering and untruthfulness.

What we have remaining is a lone threat made at a remote time outside the period of the indictment which operated to so terrify the complaining witness constantly over an eight month period as to render him helpless to attempt to leave the farm. The "scheme" to hold him "in ignorance of his rights" claimed by the government (i. e. the keeping from school, the forbidding of conversation with outsiders, etc.) can only serve to attempt to explain off how a man could have been terrified by such a patently absurd threat; it can have no coercive value of its own.

It is difficult, if not impossible, to formulate a rule which will cover all conceivable situations--where to draw

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the line? But some alleged "coercion" must be insufficient to create a jury issue. If the defendant's white hair somehow terrified Luis Oros--or the defendant's glasses--or his general demeanor, surely a jury issue would not be created as to a "holding" to involuntary servitude. We have already cited to the court claimed analogies in the law of extortion and assault and we will not belabor those. Although the line may be a somewhat indefinable one, it is submitted that the coercion here claimed could not reasonably have held Oros to involuntary servitude.

B. Do The Particular Acts Or Threats Here Alleged Qualify as Criminal Under The Statute.

Occasionally, in the drafting of this brief, defense counsel has felt overcome by a feeling of helplessness--due to the indefinability of involuntary servitude and what constitutes a "holding" thereto. How are we to deal with the following situations?

1. B tells A he wishes to leave his employ. A knows that more than anything else B desires to get into the country club. Knowing this, and desiring to keep B in his employ, A maliciously threatens to withdraw his sponsorship of B and to blackball him completely. B, solely because of the threat and his great desire to gain entry into that social circle, stays on.

2. B comes from Mexico to work for A and later tells him he wants to leave. A threatens to have him sent back to Mexico and to prevent him or his family from returning to this country. Although A has no authority, legal or otherwise, to effect such a result, B becomes terrified and stays.

3. B tells A he is leaving his employ. A, who holds notes from B, co-signed by B's aged mother, threatens to collect his debt by foreclosing on B's mother's house. B, knowing he cannot pay the notes himself and knowing that the loss of the house will have dire effects on his mother, stays on.

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4. The situation is the same as in (2) above except that the immigration laws permit the employer to have the contract breaking employee returned to Mexico. The threat is made and B stays.

5. B wants to leave A's employ. A threatens to tell the authorities about money B stole from the till last year. Fearful of a jail term, B stays.

6. The situation is the same as in (5) above except that B never actually stole the money and A threatens to frame him and thus have him thrown in jail. B stays.

7. B tells A he's leaving for another job. A threatens to blackball him throughout the industry so as to prevent B from ever obtaining a job in his trade. A is powerful enough to produce on the threat. B stays.

8. Same situation as (7) above except A is powerless to carry out his threat, but B is fraudulently led to fear the consequences anyway. B stays.

9. B serves notice. A informs B that B's son who is finishing high school will be unable to enter Yale which has been a lifelong goal of both father and son. A is a trustee at Yale and has tremendous influence with the admissions committee. He could make the threat good and B knows it. B stays.

10. Same situation as (9) above except it so happens the admissions committee at Yale is strictly run on the merit system. B nonetheless fears A's power and stays on.

11. B informs A he wants to leave. A threatens to turn B's wife, a former employee who embezzled some money from A, over to the police. B stays.

Numerous other possible examples could be cited, but the foregoing should suffice. One other possible element might be the reason for the threat. We may assume, alternatively, for each example that the threat was made (1) because B was an employee that A could ill afford to lose at the time, or (2) because A was a thoroughly nasty man who got great pleasure out of treating people like pawns on a chess board.

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Now the question is presented. How many of the foregoing cases present a situation criminally punishable under 18 U. S. C. Sec. 1584. We will assume that in each case A has unerringly picked out B's Achilles Heel and that the particular threat, given B's psychological makeup, was a terrifying thing. Where does gamesmanship end and where does felonious behavior begin?

The court stated to the jury that the threat to foreclose on the friend's house could not, legally, be an element of the offense charged. That was, as we understood the reasoning, because it was of an economic nature and also because it was a threat merely to invoke the legal rights of a creditor. Is there something about an "economic" threat which places it on different footing? It may impose, under certain circumstances, far greater actual restraint than a threat to return someone to whence he came. And if the "legal right" to invoke the threat is the key, how about the situation where A threatens to notify the police of B's embezzlement; that is not only his legal privilege, but he may have some sort of moral obligation to report a criminal. It is morally reprehensible, perhaps, to use such a threat for the purpose of keeping someone working for you--but is that not as true of all the situations listed above.

This is not to say that the defense disagrees with the court concerning the foreclosure of Sr. Rosalio's house; instinctively, you almost have to reach the conclusion that this statute does not punish such behavior. On the other hand, where is the line to be drawn? At the country club or college, i. e. social pressure? At the economic blackball? At the threat to return to Mexico?

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It is our contention that this statute, to have any meaning, must be read in the light of the evil it was meant to combat. It was passed, in its original form, in 1813 and was obviously meant to punish those dealing in the slave trade. Revised Statutes, 5377. Unless we are now to be faced with an incredibly vague statute, infra, virtually impossible to defend against, Section 1584 must be read narrowly in terms of the old institution of slavery. A slave was a chattel and under the full dominion of his master. If not actually held by force, he was held by the constant threat of force. If he were to leave, legal processes would then be invoked to return him to the master, at whose hands he could then be physically beaten or incarcerated. Overlying the whole system was the constant threat of force, violence and physical restraint. The present statute similarly should be interpreted in such a manner so as to proscribe certain easily definable behavior; else no reasonable man would be able to predict what is criminal and the statute would be unconstitutionally vague.

C. Proof That The Holding Was Knowing and Wilful.

This point has been argued and briefed before. The threats and activities alleged to make up the holding have been discussed supra. Because the elements of knowledge and wilfulness are usually to be inferred from the evidence, there is a tendency to ignore them completely in a motion like this one; they should mean something however when we are asking ourselves whether any reasonable jury could have found the accused guilty.

We start with the remote and farfetched nature of the threat. Add to that the open farm, the lack of supervision and

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the defendant's long absences; although the Government is entitled to all reasonable inferences, the court is not obliged or entitled to ignore the undisputed physical facts. Then the threats by innuendo--if the accused was "wilfully" holding them there, could he conceivably have gone eight months without repeating the only threat apparently addressed to the breaking of the contract. How can the jury be allowed to infer specific criminal intent when the evidence is clear that neither Oros nor anyone else communicated to the accused that the family wished to leave. By Oros' own testimony we see that when he had other complaints, he let Shackney know about them. He complained about the little girls working and the situation was remedied; he complained about the money and the defendant turned him down. But complain he did. In the face of the fact that all the evidence indicates otherwise, we have allowed the jury to infer that the accused somehow knew Oros wanted to leave--by osmosis perhaps--and that he therefore knowing and wilfully went about "holding" him there by the most roundabout methods imaginable.

One further point should be made. The "threat" here is one which, the Government concedes, the defendant was legally powerless to carry out. In order for a "holding" by such a threat to be knowing and wilful, the defendant must know that Luis Oros was ignorant of his rights. That knowledge must be inferred from something in the evidence. But the evidence all points in the other direction. Shackney knew Oros had been here twice before. Shackney knew that Oros had been attempting to to return for 15 years and that he had been driving a cab for 11

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of those years. Shackney surely must have had reasonable ground to believe that this "immigrant" had been informed of his rights before entering the country. How could Shackney have been so confident in Oros' ignorance? Does the evidence possibly support such knowledge or confidence on the part of the accused? We have been unable to find it.

The jury had to believe that Shackney had the confidence and power of a dozen Svengalis and that Oros played the most magnificent Trilby in history. In the face of the physical and admitted facts here, the "holding" is more than improbable; it is unbelievable. What is unbelievable should not have been submitted to the jury.

III The Statute If It Be Construed To Encompass This Situation, Is Unconstitutionally Vague.

The extreme difficulty of determining just what kind of conduct is proscribed as a "holding to involuntary servitude" has been discussed supra. It has been suggested that the statute be read narrowly, in accordance with its historical background, so as to punish only a holding accomplished by the use--or threat of--physical force, restraint, or incarceration. If the statute is read more broadly, then, it is submitted, it is unconstitutionally vague.

The leading case on the vagueness of penal statutes is Connally vs. General Construction Co., 269 U. S. 385 (1926). There, the Supreme Court said,

> " The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal

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> statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing such a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."
>
> 269 U. S. 385 at 393.
>
> ". And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.
>
> 269 U. S. 385 at 391.

See also Lanzetta vs. New Jersey, 306 U. S. 451 (1939); United States vs. Capital Traction Co., 34 App. D. C. 592 (1910); United States vs. Washington R. & Electric Co., 34 App. D. C. 599 (1910).

As already pointed out, it is virtually impossible to draw a line, legally or morally, between a "legal holding" and an "illegal holding". Furthermore, the entire concept of "voluntariness", insofar as it brings into play a highly subjective frame of mind of the victim, injects an even greater element of uncertainty and vagueness. Except as applied to the armed guard-manacle type of holding, the statute gives almost no warning of what is actually criminal behavior. We have had two lawyers in our office, hopefully of "common intelligence", unable to unravel the enigma of this statute; judging from the trial proceedings, it appeared that a number of quite difficult questions of construction had occurred to the court. Can this be anything but too vague?

Defendant recognizes the difficulty posed by the case of Screws vs. United States, 325 U. S. 91 (1945), where Justice Douglas spoke for three other members of the Court in stating that the requirement of wilfulness cured a statute which might otherwise have been unconstitutionally vague.

A number of things must be pointed out about Screws, however First, there was no opinion of the court; Justice Rutledge, also though disagreeing with Douglas, concurred in the result only/so to avoid a hopeless deadlock. Second, the opinion of Justice Roberts, concurred in by Justices Frankfurter and Jackson, makes better sense; if a man is not apprised properly of what is illegal, how can the requirement of wilfulness cure the constitutional defect in the statute. The "wilful" performance of a legal act-- i. e. with evil motive--is not a crime, and the requirement of specific intent cannot further inform the citizen as to what is legal and what is illegal. How can you act with specific evil intent to violate the statute when the statute does not sufficiently define the conduct it forbids?

As an alternative to granting the motion for judgment of acquittal, the defendant asks the court to dismiss the indictment as based on a statute which is unconstitutionally vague. The withdrawal of the earlier motion to dismiss does not amount to a waiver of this constitutional argument. Before the evidence came in, defendant could not know exactly what he was charged with. In another vagueness case, the Supreme Court said,

> " Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes, proof."
>
> United States vs. Petrillo, 332 U. S. 1, 6 (1947).

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We are asking the court to construe the statute narrowly; if the statute is not so construed, we challenge its constitutionality.

THE DEFENDANT

By_____
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APR 17 1963

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
v.	:	NO. 10,698 CRIMINAL
DAVID ICCHOK SHACKNEY, a/k/a DAVID ISSAC SHACKNEY and DAVID I. SHACKNEY	:	

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL THE PROSECUTION TO ELECT

The defendant's Motion to Compel the Prosecution to Elect is directed at Counts One and Three of the Indictment. Although the Motion itself sets forth no grounds upon which the Motion is made, it is assumed that the ground is the same as that set forth in a memorandum filed some time previously with the Court by the defense entitled VII Dismissal of Counts Three and Four. The ground there specified is that the involuntary servitude count (Count 3) is an "illegal duplication" of the peonage count (Count 1).

I

The counts in question do not duplicate one another. The applicable rule is that where the same conduct constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. Blockburger v. United States, 284 U.S. 299 (1932) Gavieres v. United States, 220 U.S. 338 (1911).

Applying the rule to the instant case, the count on peonage under 18 U.S.C. 1581(a) requires proof of the element of indebtedness, or claimed indebtedness. See, e.g., Pierce v. United States, 146 F. 2d 84 (5th Cir. 1944); U. S. v. Clement, 171 Fed. 974 (D. S.C. 1909). The count on involuntary servitude under 18 U.S.C. 1584 has no such requirement. On the other hand, the statute (18 U.S.C. 1584) under which the count on involuntary servitude is drawn specifically states that the holding must be done "willfully and knowingly" whereas there is no such language in the statute (18 U.S.C. 1581(a)) under which the peonage count is drawn. It would appear, therefore, that the only intent necessary with regard to the peonage count is the general one that the accused must not have acted mistakenly or inadvertently. See, e.g., Sinclair

v. United States, 279 U.S. 263, 299 (1928). Consequently, the element of specific intent is present in the offense charged in Count 3 but lacking in the offense charged in Count 1.

Teran v. United States, 88 F. 2d 54 (8th Cir. 1937) is a case which aptly illustrates the principle on identity of offenses. There the defendant was convicted on a four-count indictment charging violations of the Internal Revenue laws. Count 3 charged that on a specified date in a certain automobile in a certain place the defendant unlawfully, knowingly and feloniously concealed and aided in the concealing of distilled spirits on which the required tax had not been paid. Count 4 charged that the same defendant, on the same day, in the same automobile, in the same place, unlawfully, wilfully and feloniously possessed distilled spirits without the immediate container thereof having affixed thereto a stamp denoting the quantity contained therein and evidencing payment of the required revenue taxes. Before trial the defendant moved to compel the government to elect to proceed on either count 3 or count 4 on the ground that they alleged the same offense in different language. The motion was denied and this was urged on appeal as a ground for reversal. The Court of Appeals held that the trial court did not err in denying the motion. Said the Court of Appeals: "The offenses were purely statutory. It was the province of Congress to define these offenses, and having done so, its definition is conclusive." The Court went on to say that each count charged a distinct statutory offense and required proof of a fact which the other did not. See, also, Brennan v. United States, 240 F. 2d 253 (8th Cir. 1957).

II

Even if the offenses charged in Counts 1 and 3 of the instant case are considered to be a duplication of each other, the Government should not be compelled to elect to proceed on one or the other. Such election is being requested, presumably, on the basis of Rule 14, Federal Rules of Criminal Procedure, Title 18, United States Code, which provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts . . . or provide whatever other relief justice requires.

Such a motion is addressed to the sound discretion of the trial court. See, e.g., Opper v. United States, 348 U.S. 84, 95 (1954); Randall v. United States,

148 F. 2d 234 (5th Cir. 1945); United States v. Solomon, 26 F.R.D. 397 (S.D. Ill. 1960). However, as the court stated in United States v. Solomon, supra, at 403:

> Unless it appears that the rights of defendants would be prejudiced and that they would be embarrassed in their defense by the fact of being tried upon multiple charges before the same jury, a court should not compel election between counts properly joined in an indictment. (Emphasis added).

In Finnegan v. United States, 204 F. 2d 105 (8th Cir. 1953), the court said, in holding that the motion to compel election there was properly denied:

> (I)t may be said that the fundamental principle underlying the practice of requiring the prosecution to choose between offenses or counts is the prevention of prejudice and embarrassment to the accused, and if the charges are of the same general character and are manifestly joined in one indictment in good faith, the government should not be required to elect upon which count or counts it will proceed to trial. p. 110 (Emphasis added).

The court in the Finnegan case observed that the defendant had not shown, nor made any effort to show, how he would be "confounded in his defense" by being tried on all the counts there involved.

In the instant case, the defense has not shown, nor can it be seen, how the defendant will be prejudiced or embarrassed in his defense by being tried on all seven of the remaining counts in the indictment. It is submitted that in the absence of such a showing, compelling the Government to elect between Counts 1 and 3 would be an abuse of the Court's discretion.

In this connection, United States v. Maryland State Licensed Beverage Association, 240 F. 2d 420 (4th Cir. 1957), is appropos. In that case the trial court entered an order requiring the government to elect whether it would proceed under the first or second count of an indictment. The first count charged a conspiracy to restrain interstate commerce under Section 1 of the Sherman Act. The second count charged a conspiracy to monopolize under Section 2 of the same act. Counsel for the government conceded that the same proof would be relied on for the establishment of the conspiracy alleged in both counts. The trial judge, for that reason, was of the opinion that only one conspiracy was involved and that he should, on the authority of Braverman v. United States, 317 U.S. 49, require one count to be dismissed. The Court of Appeals held that this was error and reversed. Said the Court of Appeals at

> The fact that the same evidence was relied upon to establish the conspiracies charged in both counts of the indictment does not mean necessarily that there was only one conspiracy. . . . Even if only one conspiracy was involved, however, this would not support the action taken by the District Judge. Braverman's case holds merely that there may not be more than one punishment for a single conspiracy, not that a single conspiracy may not be charged as a crime in several counts to meet different interpretations that might be placed upon the evidence by the jury. Upon the government's evidence . . . the jury might conceivably conclude that the accused were guilty of conspiracy to restrain trade by fixing prices but not of conspiracy to monopolize, or they might conclude that they were guilty of conspiracy to monopolize but not to fix prices or they might conclude that they were guilty of conspiracy to do both. If the evidence showed that there was only one conspiracy, the judge would impose only one punishment; but this is no reason for requiring dismissal of one of the counts in the early stages of the case . . .
> "It has long been the approved practice to charge, by several counts, the same offense as committed in different ways or by different means, to such extent as will be necessary to provide for every possible contingency in the evidence." 27 Am. Jur. p. 688.
>
> * * *
>
> The purpose underlying the practice of requiring in proper cases that the prosecution elect between offenses or counts is to prevent prejudice to the accused which might result from being required to meet a multiplicity of charges in one trial. It has no application to a case where the different counts are merely variations or modifications of the same charge. . . Here there could be no possible prejudice to the accused in going to trial under an indictment charging in separate counts that conduct complained of constituted violations of separate sections of the Sherman Act; and to require such an election was to prejudice the prosecution in the presentation of its case and cannot be upheld as a sound exercise of discretion.

Likewise, in the instant case, there can be no possible prejudice to the defendant by allowing the trial to continue on both of the counts in question. To compel an election would not be justified and would put the Government at a possible disadvantage in not being able to meet the various interpretations which may be placed on the evidence by the jury.

The decision in the Maryland State Licensed Beverage Association case has been approved and followed by the Second Circuit in United States v.

> Although the proof showed only one conspiracy, two counts were permissible to meet the different interpretations which might be placed on evidence by the jury.

See, also, the Per Curiam decision in Williams v. United States, 244 F. 2d 303 (4th Cir. 1957).

III

The Court has indicated his concern over the case of Milanovich v. United States, 365 U.S. 551. There the Supreme Court, in a five to four decision held that a defendant could not be convicted of stealing government property and for receiving and concealing the same property and that the jury should have been charged that they could convict of either but not of both. Even though four members of the Supreme disagreed with the majority and felt that under the facts of that case the defendant properly could have been found guilty of both offenses charged in the indictment, nevertheless, there is nothing in the opinion of the majority which contradicts the principle that the same offense may be alleged in separate counts in different ways so as to meet the varying interpretations which might be placed on the evidence by the jury. Indeed, allowing the case to go to the jury on two counts under an instruction of the type required by the Milanovich decision is just as consistent with the rule as would be sending both counts to the jury with no instruction on the point. Consequently, nothing in the Milanovich decision requires that the Government be compelled to elect between Counts 1 and 3.

IV

Finally, it is submitted that the defendant has waived his right to object to the indictment on the ground that Counts 1 and 3 duplicate each other. Before the trial began the defense moved for dismissal of the indictment on the ground, inter alia, that "Counts 1 and 3 are a duplication in that the allegations are identical except for different labels." Subsequently, and before the motion was heard, the defendant withdrew his motion to dismiss for the reason that he was "desirous of having his guilt or innocence adjudged by a full jury of 12." For this reason and in view of Rule 12(b)(2) of the Federal Rules of Criminal Procedure, Title 18, United States Code, the defendant cannot now

insist upon compelling the Government to elect even if the offenses in the specified counts are duplicative, as to which counsel for the Government does not agree.

Respectfully submitted,

UNITED STATES OF AMERICA

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United States Attorney

BY JAMES D. O'CONNOR
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